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No. 78-13

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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WILLIAM F. SCHOENHUT, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a-47a) is reported at 576 F.2d 1010. The opinion of the district court (Pet. App. 48a-89a) is reported at 432 F.Supp. 470.

### JURISDICTION

The judgment of the court of appeals was entered on April 17, 1978. A petition for rehearing was denied on June 5, 1978. The petition for a writ of

certiorari was filed on July 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the government may appeal a district court's judgment of acquittal entered after a jury has returned a guilty verdict.

2. Whether there was sufficient evidence to support petitioner's conviction.

## STATEMENT

Following a trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was found guilty by a jury of receiving a fee for procuring a loan from a bank, in violation of 18 U.S.C. 215 (count 1); willful misapplication of bank funds, in violation of 18 U.S.C. 656 (count 3); submission of false documents to a bank, in violation of 18 U.S.C. 1005 (count 6); submission of false reports to a bank, in violation of 18 U.S.C. 1005 (count 8); and conspiracy, in violation of 18 U.S.C. 371 (count 9). Following the verdict, the district court granted a judgment of acquittal in favor of petitioner on all five counts (Pet. App. 48a-89a). On the government's appeal, the court of appeals vacated the district court's judgment of acquittal on counts 1, 8, and 9, with instructions to reinstate the jury's verdict of guilty (Pet. App. 47a).[1]

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[1] The court of appeals affirmed the district court's judgment of acquittal on count 3. The government did not appeal the district court's judgment of acquittal on count 6 (Pet. App. 12a n.1).

The government's evidence is summarized in the opinion of the court of appeals (Pet. App. 12a-23a). In 1972 and 1973 petitioner was an Assistant Vice President in the mortgage department of the Central Penn National Bank. Delaware Valley Mortgage and Realty Corporation, a firm which purchased mortgages from realtors and resold them to financial institutions, and also financed construction projects, was a customer of Central Penn (Pet. App. 13a). In 1972 and 1973 Delaware Valley obtained financing from Central Penn under a mortgage warehousing agreement that permitted it to withdraw funds from a $2 million "warehouse account" to purchase mortgages.[2] Petitioner was responsible for the proper operation of the Central Penn mortgage department, which controlled Delaware Valley's warehouse account (Pet. App. 15a). The bank reserved the right to reject any request by Delaware Valley for an advance

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[2] The court of appeals summarized the operation of Delaware Valley's warehouse account as follows (Pet. App. 14a-15a):

> At settlement on the purchase of a parcel of property, Delaware Valley would write out a check on the warehouse account, not to exceed its credit limit, to accomplish closing. This check, along with a demand collateral note in Central Penn's name, the mortgage agreement between Delaware Valley and the mortgagee, other required papers, and a commitment letter from a permanent lender indicating permanent financing for the project, would then be sent to the bank. Whenever the permanent lender purchased the mortgage from Delaware Valley, the Central Penn loan would be repaid, the mortgage transferred to the permanent lender, and the appropriate amount reinstated to the credit line.

from its warehouse account if that request was not supported by proper documentation (Pet. App. 29a).

In the spring of 1973, Heimbecker, Nirenberg, Inverso and Pierce, all officers or employees of Delaware Valley, decided to purchase and construct homes for their own personal profit on a tract of land then owned by the Karlee Corporation. Heimbecker suggested that the project be financed through the warehouse account at Central Penn and that petitioner be brought into the venture to facilitate the loan (2 A. 1.76-77; 3 A. 2.46-47, 2.49-50; 4 A. 3.23-24).[3] Petitioner inspected the building site and agreed with Heimbecker's proposal that the warehouse account be manipulated to finance the project (Pet. App. 15a-16a). Thereafter, they organized the Greenmeadow Holding Company; petitioner was given 10% of the stock of Greenmeadow although he made no capital contribution to the venture.[4] The others each received 22.5% of the stock (Pet. App. 16a).

On July 19, 1973, Greenmeadow obtained a construction loan of $1,495,400 from Delaware Valley and purchased the tract from Karlee with a check for $150,750 drawn on Delaware Valley's warehouse account. The documents evidencing this transaction

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[3] "A." refers to the government's appendix in the court of appeals.

[4] Heimbecker informed the others that petitioner's share of the stock was compensation for his efforts and assistance in obtaining financing for the Greenmeadow construction project (2 A. 1.76-78; 3 A. 2.49-50; 4 A. 3.24). Petitioner was later made an equal shareholder in the company (Pet. App. 16a-17a n.3).

were forged by persons purporting to be principals of Greenmeadow to prevent Delaware Valley's parent firm from discovering that Delaware Valley officials had a financial interest in Greenmeadow and had received a Delaware Valley loan (Pet. App. 17a). The documents were then forwarded to Central Penn's mortgage department for processing. While petitioner did not know that certain names on the documents were forged, he did know that the true principals of Grenmeadow were in fact officials of Delaware Valley (Pet. App. 17a). On July 20, 1973, Central Penn credited Delaware Valley's warehouse account with $150,750 as an advance on the first stage of the Greenmeadow construction loan (Pet. App. 18a).

Following a routine audit of Delaware Valley's warehouse account in September 1973, petitioner made various false statements to his superiors concerning certain lenders' commitment letters that were essential to continuation of Delaware Valley's warehouse line of credit at Central Penn (Pet. App. 18a-20a). In November 1973 petitioner, in response to a conflict of interest questionnaire distributed by the bank, stated that he did not have any interest, financial or otherwise, in any customer of the bank, that he had not received any gifts or benefits from any customer of the bank, and that he had not acquired any stock, securities or property because of his employment with the bank (Pet. App. 21a).

Central Penn advanced $620,000 to the Greenmeadow project through the Delaware Valley ware-

house line from July 1973 until the fraud was discovered in August 1974 (Pet. App. 18a).

## ARGUMENT

1. Petitioner contends (Pet. 11-17) that the Double Jeopardy Clause precluded the government's appeal in this case because the district court granted a judgment of acquittal following the jury's verdict of guilty.[5] This claim was properly rejected by the court below (Pet. App. 23a n.7).

The Double Jeopardy Clause "was primarily 'directed at the threat of multiple prosecutions' and posed no bar to Government appeals 'where those appeals would not require a new trial.'" *United States* v. *Scott*, No. 76-1382 (June 14, 1978), slip op. 3; *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977); *United States* v. *Wilson*, 420 U.S. 332, 346 (1975). A government appeal is therefore permissible if a reversal would not necessitate a new trial or further fact-finding proceedings. *United States* v. *Scott, supra; United States v. Martin Linen Supply Co., supra*, 430 U.S. at 570; *United States* v. *Jenkins*, 420 U.S. 358, 370 (1975). Although the Court has never been squarely presented with the issue, on a number of occasions it has expressly stated that "* * * where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal an appeal is permitted." *United States* v. *Jenkins, supra,*

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[5] The same issue is presented in *Clark* v. *United States*, No. 78-5114. We are sending petitioner a copy of our brief in opposition in that case.

420 U.S. at 365; *United States* v. *Scott*, *supra*, slip op. 8. See also *United States* v. *Wilson*, *supra*, 420 U.S. at 344-345, 352-353.

This conclusion does not conflict with the Double Jeopardy Clause's purpose of shielding defendants from multiple prosecutions, "[s]ince reversal on appeal would merely reinstate the jury's verdict * * *." *United States* v. *Wilson*, *supra*, 420 U.S. at 344-345. It in no way affords the prosecution a second opportunity to supply evidence or gives it a "second bite at the apple." *Burks* v. *United States*, No. 76-6528 (June 14, 1978), slip op. 16. The appealability of post-guilty-verdict acquittals is also supported by the uniform holdings of the courts of appeals. See, *e.g.*, *United States* v. *Burroughs*, 564 F.2d 1111, 1117-1119 (4th Cir. 1977); *United States* v. *Cahalane*, 560 F.2d 601, 603 n.2 (3d Cir. 1977), cert. denied, 434 U.S. 1045 (1978); *United States* v. *Ramos*, 558 F.2d 545, 546 (9th Cir. 1977); *United States* v. *Rojas*, 554 F.2d 938 (9th Cir. 1977); *United States* v. *Hemphill*, 544 F.2d 341, 343 (8th Cir. 1976), cert. denied, 430 U.S. 967 (1977); *United States* v. *Cravero*, 530 F.2d 666, 670-671 (5th Cir. 1976); *United States* v. *De Garces*, 518 F.2d 1156, 1159 (2d Cir. 1975).

In the present case, the jury returned a guilty verdict and the district court granted petitioner's motion for a judgment of acquittal based upon its view that the government had failed to prove guilt. The court of appeals examined the evidence in detail and ordered reinstatement of the guilty verdict (Pet.

App. 47a).[6] No retrial is necessary. Therefore petitioner has no claim of double jeopardy. *United States* v. *Jenkins, supra; United States* v. *Scott, supra.*

Petitioner to the contrary (Pet. 14-17), the fact that the district court has not yet ruled on petitioner's motions for a new trial and arrest of judgment is irrelevant. The district court's response to such motions involves an appraisal of alleged trial error, not further fact finding, and cannot be equated with a second trial.[7]

2. Petitioner contends (Pet. 17-18) that there was insufficient evidence to support the verdict on count 1 for receiving a fee as a bank official for procuring a loan from his bank, in violation of 18 U.S.C. 215. Specifically, he argues that the court of appeals based its conclusion of guilt on petitioner's conceded failure to reveal his interest in the Greenmeadow venture. He also states, without much elaboration (Pet. 9 n.*), that if there is insufficient evidence to support the verdict on count 1, the evidence would be insufficient on count 8, the count charging the making of false statements in the bank's questionnaire, and on count 9, the conspiracy count. However, as the court below concluded in a detailed review of the evidence, upon which we rely (Pet. App. 24a-36a, 40a-47a), the evidence amply supported the verdict.

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[6] See note 1, *supra.*

[7] This Court has rejected petitioner's argument (Pet. App. 11-13) that the government may not appeal a judgment of acquittal under Rule 29(c), Fed. R. Crim. P. *United States* v. *Martin Linen Supply Co., supra,* 430 U.S. at 568.

It is clear, for the reasons stated in the opinion of the court of appeals, that a loan was in fact made by Central Penn to Delaware Valley for the benefit and use of the Greenmeadow principals' construction project. There were extensions of credit on the warehouse line to Delaware Valley that were not mechanical or automatic, since the bank imposed stringent requirements for adequate documentation on each request for funds. The mortgage department, under petitioner's supervision, had the responsibility to assess, and the power to reject, any request. Notwithstanding petitioner's contention to the contrary (Pet. 18), the record reveals that the bank did have contractual power to exercise control over Delaware Valley's warehouse account (Pet. App. 30a n.11). The bank had complete control over the warehouse line, and the transaction between Central Penn and Delaware Valley was a loan with all of its characteristics (*ibid.*). Indeed, Central Penn treated the funds that were advanced on the warehouse lines as a loan. As the court of appeals also noted, the mortgage department had a loan policy manual, written by petitioner, that applied to loans made on the warehouse lines. Significantly, it provided for inspection of construction sites of companies that received loans on the warehouse lines (Pet. App. 20a n.6). Any deviations from these procedures would have to be approved by petitioner (*ibid.*).[8]

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[8] Petitioner argues (Pet. 18) that the court of appeals incorrectly relied on this manual because it was written after the alleged violations occurred. The evidence, however, shows

There was ample evidence that petitioner procured the loan from Central Penn to the Greenmeadow principals, in violation of 18 U.S.C. 215. From his supervisory position in the mortgage department of the bank, petitioner knew of the lack of capital in the Greenmeadow project and the true identities of its officers. His acceptance of Greenmeadow stock gave him a financial interest in the outcome of the loans, an interest that he disclosed to no one at the bank. Moreover, petitioner gave financial advice to the Greenmeadow principals concerning the use of the warehouse account to secure the loans for Greenmeadow. In addition to this evidence of misconduct, there was testimony that petitioner was rewarded with stock in Greenmeadow for his help in securing the loan (Pet. App. 43a n.16). In sum, by his own action and concealment, petitioner successfully endeavored to secure funds for Greenmeadow through Delaware Valley's warehouse account with the bank.[9]

Finally, there was ample evidence to support petitioner's conviction on count 8 (making false statements as an officer to the bank), since petitioner re-

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that the loan manual was prepared by petitioner and issued on May 1, 1974 (1 A. 0-217-227). Central Penn advanced a total of $619,250 to the Greenmeadow project through Delaware Valley's warehouse account until September of 1974 (4 A. 3-145).

[9] Petitioner suggests that Central Penn might have condoned the transaction if petitioner's interest in Greenmeadow was disclosed (Pet. 18). This argument is irrelevant given the fact that there was sufficient evidence that petitioner endeavored to procure a loan in violation of 18 U.S.C. 215.

sponded falsely to question 6 on the questionnaire, distributed by the bank, that he had not acquired any stock made available to him by reason of his employment with the bank.[10] Noting that there was testimony that Heimbecker made a gift of the Greenmeadow stock to petitioner, the court of appeals correctly ruled that the jury could have inferred that petitioner knew that the stock he received was compensation for procuring the loan or a gift because of his crucial position in the mortgage department of the bank (Pet. App. 42a-43a).

The evidence also showed that petitioner actively participated in the conspiracy by agreeing to procure a loan from the bank for the Greenmeadow project (count 9). Not only did petitioner have substantial dealings with the other co-conspirators, advising them how to finance the Greenmeadow project by manipulating the Delaware Valley warehouse account, but he was given an equal membership in their corporation and an opportunity to share the profit of their business venture. Petitioner's active assistance in procuring the loan and his stake in the business venture fully support his conspiracy conviction. *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943).

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[10] It is also clear that petitioner responded falsely to question 1 on the questionnaire when he stated that he did not have an interest, financial or otherwise, in a customer of the bank, and to question 5, when he stated that he had not received a gift from a customer of the bank.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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